14A the judge may give any such directions as he could give on a summons for directions. We cannot but reject this submission. As we have earlier pointed out, there is already provision in rule 4 of Order 14A to the same effect, and the provision in rule 4 of the power to give all such directions as to the further conduct of the action as might be given on a summons for directions only where leave to defend is given would clearly negate any power to dismiss an action peremptorily *ex mero motu* where an order for leave to defend is the only recourse open under rule 1(1). If in fact any such power in the judge to dismiss an action of his own motion in an Order 14A application was intended, it should be and would have been expressly so provided for in Order 14A itself on the lines of Order 25 rule 3 which is sequential to rule 2 of Order 25, and we would reiterate that the provisions of rule 4 of Order 14A clearly indicate the contrary.

If the respondent wanted the issue of whether or not there was a binding contract determined as a preliminary point and the dismissal of the action in the event this was found in his favour and pleadings had been delivered and the point raised therein, he could then have gone about this by a separate application initially or after succeeding in getting leave to defend by seeking directions under Order 14A rule 4 for a trial of a preliminary issue of law and the dismissal of the action under Order 25 rules 2 and 3 if he could meet the requirements therefor but it would certainly not be open to him to have this done as the end result of the Order 14A application itself. Mr. Hepworth frankly admits that he is unable to find a single authority where an issue had been finally determined in favour of a defendant and the action dismissed in an application under Order 14 or Order 14A by a judge acting *suo motu*. This is not surprising as the dearth or rather absence of authority would indicate that the point in question is clear and unexceptionable, and we would think it was a situation such as this which prompted James L.J., to remark in *Panama and South Pacific Telegraph Company* v. *India Rubber, Gutta Percha, and Telegraph Works Company*[8] (at page 526):

"It is said that there is no authority and no dictum to that effect. The clearer a thing is, the more difficult it is to find any express authority or any dictum exactly to the point."

In the event we find that all that was open to the learned judge to do in regard to the appellants' application for summary judgment under Order 14A was to give the respondent unconditional leave to defend. We accordingly allow the appeal with costs to the appellants, set aside the order of the learned judge made on January 17, 1979 in so far as it relates to the appellants' application under Order 14A and the dismissal of the action and give the respondent unconditional leave to defend the action. The costs below will be in the cause and the deposit lodged in court by way of security for costs is to be paid out to the appellants.

Appeal allowed.

Solicitors: *Lim Kean Chye & Co.; Lewis & Co.*

SENIWISMA S & O AKITEK PLANNER v. PERUSAHAAN HIAZ SDN. BHD.

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat & Syed Othman F.JJ.) November 5, 1979 & February 14, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 52 of 1978]

Practice and Procedure — Claim by architects for preparation of lay-out plan — Lay-out plan not submitted by architects for approval — Defence — Whether architects entitled to obtain summary judgment — Triable issues — R.S.C. 1957, O. 14.

Architects — Fees — Scale of Fees — Architects Act, 1967, s. 4(d).

Contract — Engagement of architect — Whether duty of architect to submit plans for approval — Fees — Not in accordance with fees fixed by Board of Architects — Whether contract illegal — Architects Act, 1967, s. 4(d).

In this case the appellants, who were architects, claimed under an agreement under which they were engaged to prepare a layout plan for housing development. The layout plan was not submitted for approval by the architects but by the respondents themselves. The plan was not approved but approval was given to another amended plan. The respondents offered $800 for the work done but the appellants claimed the sum of $65,500. The respondents also claimed that the charges should be in accordance with the Institute of Architects' scale of fees but this was disputed by the appellants. The Assistant Registrar gave the respondents conditional leave to defend upon payment into court of the sum claimed and this was upheld in the High Court. The appellant appealed.

Held: if all the main points had been properly adverted to in the pleadings the finding of the court would have been that there were *bona fide* triable issues in this case. In the circumstances the appeal must be dismissed.

Cases referred to:-

(1) *Gilbert and Partners* v. *Knight* [1968] 2 All E.R. 248.
(2) *Shanghai Hall Ltd.* v. *Town House Hotel Ltd.* [1967] 1 M.L.J. 223, 224.
(3) *Jacob* v. *Booth's Distillery Co.* (1901) 85 L.T. 262.
(4) *Fieldrank Ltd.* v. *Stein* [1961] 3 All E.R. 681.

FEDERAL COURT.

C.H. Cheah for the appellants.

A.M. Sebastian for the respondents.

Cur. Adv. Vult.

Syed Othman F.J. (delivering the judgment of the Court): This is appeal is against the decision of the High Court at Kuala Lumpur upholding the order of the Assistant Registrar whereby he rejected the appellants' application for final judgment under Order 14 and granted the respondents conditional leave to defend the appellants' action upon payment into court of the sum claimed, $65,500.

The appellants, who are Architects, claim that under an agreement contained in two letters dated September 12, 1974 and October 20, 1974 the respondents engaged the appellants as architects to prepare a layout plan for housing development on a piece of land in Klang which was submitted to the relevant authorities for approval; by paragraph 4 of the letter dated September 12, 1974 in the preparation of the layout plan it was agreed that the professional fees were as follows:

"When project is to be proceeded with to full service, a fix fee per lot shall be charged on a scale of $50 per lot for the first 10 lots and $25 for each additional lots. *BUT* when a project is not proceeded with to full service a fix fee per lot shall be charged on a scale of $100 per lot for each

additional lot. This scale excludes surveyors charges for any survey or levelling work required."

In June, 1977 the respondents terminated the appellants' services and asked them to send any outstanding bills; the appellants through their solicitors by letter asked for payment of $65,500 on the basis that the project was not proceeded with to full service, i.e. first 10 lots at $50 per lot = $500, the balance 650 lots at $100 per lot = $65,000; the respondents refused to pay the sum.

The respondents' defence is that there was an oral agreement which made approval by the appropriate authorities of the layout plan to be a condition precedent to the appellants' right to remuneration; the layout plan on submission to the State Government was not approved; the appellants rejected an offer of $800 for work done. In the alternative, the respondents say the appellants' claim should have been referred to the arbitrator pursuant to clause 5 of the Standard Conditions of Engagement and Scale of Professional Charges of the Malaysian Institute of Architects (which will be referred to as the Institute's scales).

In the affidavit supporting the appellants' application under Order 14 for liberty to sign final judgment, the appellants mainly relied on the contract of engagement set out above.

The respondents' affidavit in reply stated that the appellant had committed a material breach of the contract as in letter of September 12, 1974 by failing to submit the layout plan to the appropriate authorities for approval, and that the respondents themselves submitted it but it was not approved; approval was given to another plan prepared by the Jabatan Perancang Bandar dan Kampung, Negeri Selangor; the only work carried out by the appellants was preparing the layout plan and the fees should be in accordance with item 7(iv) of the Institute's scales.

The appellants by further affidavit in reply stated that it was the respondents who insisted on submitting the layout plan to the authorities themselves. They denied that their layout plan had been rejected and stated that every layout plan submitted by an applicant or his architects was subject to amendments by the authorities; they denied that their fees should be in accordance with the Institute's scales.

The Assistant Registrar after hearing the arguments found the defence a sham but nevertheless allowed the defendants to defend the action on condition as indicated above. On appeal, the learned judge found in effect that the appellants' charges appeared to be penal in nature, because if there had been full service, they could not have charged more than $16,750 i.e. first 10 lots at $50 per lot = $500, the balance 650 lots at $25 per lot = $16,250, and, if penal in nature, damages would have to be determined. He then said:

"But before this question could be determined the question of the plaintiffs having any claim at all had to be considered in view of their layout plan not having been approved. As stated earlier the defendants alleged an oral agreement to the effect that fees would not be payable unless approval was obtained. The existence or otherwise of this oral agreement is a question of fact which can only be determined at a proper trial. It appeared to me that it could very well be that the allegation of an oral agreement was merely a sham defence and in the result I was of the opinion that the order made by the Assistant Registrar was justified in the circumstances...."

Before us it has been urged that the whole claim was founded on contract, and the learned judge had no ground for finding that there had been an oral agreement varying the contract evidenced in the letters, as such oral agreement, although pleaded, was not adverted to in the respondents' affidavit in reply to the appellants' affidavit accompanying the application for final judgment under Order 14.

In dealing with the case here, it is not proposed to discuss the authorities in reference to an application under Order 14. They are too well known. On this aspect both sides are indeed on common ground. Arguments have been mainly on the pleadings and the affidavits as to whether or not there are triable issues.

It may be accepted that the contention by the respondents that there was an oral agreement varying the contract of engagement is on tenuous ground. But it must be said that both sides have not been wholly open in their pleadings as to material facts from the beginning. Some of these facts came out in the affidavits. On the pleadings and the affidavits as they stand, the appellants' contention is that they are entitled to the fees on the basis that the project was not proceeded with to full service on the mere preparation of the layout plan, notwithstanding the fact that they did not perform their duty in submitting the layout plan for approval, and notwithstanding that their layout plan was not approved by the approving authority. The respondents' contention is that the appellants are only entitled to the full fees, if the appellants submitted the layout plan for approval, and if the appellants' layout plan was in fact approved. On cursory examination, it will be seen that the approved layout plan ("AZ-3", page 70 of the Record) is entirely different from the appellants' layout plan ("OKI-4", page 49 of the Record), and the approved layout plan contains more units and essential facilities than the appellants' layout plan. The appellants' suggestion in their affidavit that the approved layout plan is in effect an amended form of their layout plan does not appear to be correct. The controversy between the parties clearly requires to be resolved.

The ensuing questions which should be determined are what was intended by the term in the contract of engagement "when the project is not proceeded with to full service" in the accepted parlance of the profession and whether the term applies to a case where the architect plays no part in seeking approval of the layout plan and also where the layout plan is in fact not approved by the authority.

Arising from these questions, there are obvious side issues which need to be determined. The respondents expressly plead that the appellants were in breach of duty when they failed to submit the layout plan for approval. The appellants do not dispute that it was their duty to submit the plan. They appear to be in no position to dispute this, since their letter of September 12, 1974 lists out the following as one of their services: "submitting applications for... Town Planning... approvals". But they say the respondents

insisted on submitting the plan themselves. The respondents deny this. Consideration will also have to be given as to the effect on the contract if it is established that the appellants failed in their duty and whether they are entitled to full fees.

To go further, the respondents in their affidavit say that the appellants' charges should be in accordance with the Institute's scales. The appellants merely disagreed that the fees are payable as set out in the Institute's scales and say that the fees should be according to the letter of September 12, 1974. The Institute's scales for a project not proceeded with to full service are $100 (as against the appellants' $50) per lot for the first 10 lots, and $50 (as against the appellants' $100) per additional lot. It will be seen that on the Institute's scales the appellants would only be entitled to $33,500 as against $65,500 as claimed. The apparent question of law to be considered is whether the appellants, who do not appear to deny that they are governed by the Institute's scales, are entitled by contract to levy their own scales and ignore the Institute's scales and, if not, whether the contract of engagement can be said to be infected with illegality, having regard to section 4(d) of the Architects Act, 1967 (Act 117) which provides that the functions of the Board of Architects are to fix from time to time with the approval of the Minister the scale of fees to be charged by Architects for professional advice or service rendered. The position in England is different. In *Gilbert & Partners* v. *Knight*[1] the Court of Appeal there held that where an express agreement has been made as to the amount of remuneration to be paid to an architect or engineer, he must be paid accordingly. There seems to be no provision there equivalent to our section 4(d) of the Architects Act, 1967.

If all the main points had been properly adverted to in the pleadings, the finding of the court would have been that there are indeed *bona fide* triable issues which do justify the order of conditional leave to defend. See *Shanghai Hall Ltd.* v. *Town House Hotel Ltd.*[2] where *Jacob* v. *Booth's Distillery Co.*[3] and *Fieldrank Ltd.* v. *Stein*[4] were discussed.

The appeal is dismissed. Costs to the respondents. Deposit to respondents to be accounted against costs.

Appeal dismissed.

Solicitors: *P.G. Lim & Co.; Lek Yan & Co.*

LIM KIAT BOON & ORS. v. LIM SEU KONG & ANOR.

[O.C.J. (Mohamed Azmi J.) March 19, 1979]
[Kuala Lumpur — Civil Suit No. 480 of 1975]

Damages, — Quantum — Leg injuries — ½" shortening — plaintiff awarded $7,500 for pain and suffering and loss of amenities and $6,000 for loss of earnings.

Employment — Damages — Payment advanced by employer to plaintiff — Whether payment could be refunded out of damages received from defendants.

The present case involved the claim of the first plaintiff only as the claims of the second and third plaintiffs had been settled. The plaintiff in this case claimed for personal injuries and loss suffered as a result of a road accident caused by the negligence of the first defendant, the driver of the car in which the plaintiff was travelling. The plaintiff suffered the following injuries: (a) left thigh deformed and bruised just above the knee (b) two lacerations 1 cm. each over shin of left leg (c) right leg 1 cm. laceration anterior border (d) a fracture of the function of lower 1/3rd and mid 1/3rd of left femur. The left leg was shortened by ½". The plaintiff walked with a slight limp and had difficulty in climbing stairs.

The plaintiff, aged 51 years, was the chief broker in the HCB company. He earned a comparatively small salary of $650 per month and a bigger brokerage commission, which varied according to his own contribution towards business turnover and rubber market condition. He was employed by H.C.B. under a contract for service. During the six-months period of incapacity, HCB Company settled the first plaintiff's hospital bills and paid his salary and brokerage commissions for six months.

Held: (1) the proposition that there should be no reduction where the money is given gratuitously or advanced by a sympathetic employer is based on the principle that the generosity of others is *res inter alios acta* and not something from which the wrongdoer should reap the benefit; where, however, the injured plaintiff receives the money as of right from the employer, either under statutory or contractual obligations, the money received is deductible;

(2) the plaintiff should be awarded $13,500 as general damages: $7,500 for pain and suffering and loss of amenities and $6,000 for loss of earnings on brokerage; $24,742.32 as special damages on condition that out of $24,742.32, the sum of $24,331.82 should be paid to HCB Company.

Cases referred to:-

(1) *Inland Revenue Commissioners* v. *Hambrook* [1956] 2 Q.B. 641, 656-7, C.A.

(2) *Parry* v. *Cleaver* [1970] A.C. 1.

(3) *Browning* v. *The War Office & Anor.* [1963] 1 Q.B. 750, C.A.

(4) *Monmouthshire County Council* v. *Smith* [1956] 1 W.L.R. 1132, 1138.

(5) *Receiver for the Metropolitan Police District* v. *Croydon Corporation* [1957] 2 Q.B. 154, 163, C.A.

(6) *Dennis* v. *London Passenger Transport Board* [1948] 1 All E.R. 779.

(7) *Bonham Carter* v. *Hyde Park Hotel, Ltd.* [1948] 64 T.L.R. 177, 178.

(8) *Sum Kum* v. *Devaki Nair & Anor.* [1964] M.L.J. 74, F.C.

CIVIL SUIT.

David Tay for the plaintiffs.

K.C. Loke for the defendants.

Cur. Adv. Vult.

Mohamed Azmi J.: This is a claim for personal injuries and loss suffered by the three plaintiffs whilst they were travelling as passengers in motorcar No. BAB 3160 driven by the first defendant as servant or